IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-817

JEFFREY RICHARD ROBBINS, *Petitioner,*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

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Petitioner, JEFFREY RICHARD ROBBINS, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeal for the State of California in and for the First Appellate District, Division Four, entered in this matter on June 1, 1976, refiled on June 30, 1976, modified on July 22, 1976 and further modified on July 27, 1976.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four and subsequent modification along with the California Supreme Court's denial of Petition for Writ of Certiorari, none of which have been reported are reproduced in the Appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 2101 and 2104, this being a Petition arriving out of a state criminal conviction.

QUESTIONS PRESENTED

1. Whether the decision of this Court in *Faretta* v. *California,* 422 U.S. 806 is to be given retroactive application?

2. Whether the decisions of this Court establish across the board authority for substantial police invasions of privacy based upon a "rational suspicion" standard.

3. Whether there is an affirmative obligation on law enforcement officials to advise, per *Miranda* v. *Arizona,* after a defendant is taken into custody when the arresting officers know or should know the defendant is likely to make incuplatory statements?

4. Whether state law, which denies a criminal defendant a full and adequate hearing on a motion to suppress evidence violates his rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution?

5. Whether the legislature may arbitrarily declare fungible vegetables to be contraband and poison, subject to seizure and destruction, and arrest and incarceration of the owner with subsequent government scrutiny and registration and forbid commerce in said goods by use of a sumptuary law which has no rational or apparent reason?

STATEMENT OF THE CASE

At 1:45 a.m. on January 5, 1975, JEFFREY RICHARD ROBBINS was stopped in his station wagon for erratic driving, which consisted of driving too slowly in a 55 MPH zone and twice going over a yellow line in negotiating an S curve on Lagon Valley Road. The California Highway Patrol observed this from Highway 80 about a quarter mile away in light fog, exited the highway and observed petitioner stop for a stop sign and followed him through the intersection, after a fourth of a mile they stopped him. Both drivers exited their vehicles and met in between. Petitioner co-operated in producing his license and registration. No citations for any traffic offenses were issued. When petitioner re-entered the vehicle for his registration, Officer DePue noticed what he concluded to be the smell of marijuana in the vehicle. Robbins was placed in the search position against the still running vehicle, patted down for weapons, and left there. DePue found a vial of amber colored liquid which he attempted to identify by opening and sniffing it. He then passed it to Sergeant Stoltz, who did the same thing and closed it. DePue then entered the car to search it and examine a pair of tweezers found on the seat. Robbins was overcome by the exhaust fumes from his car and fell down choking and spitting. He told the Sergeant that the fumes were bothering him and DePue turned off the car. He was asked if he had ingested anything that might be injurious to his health. DePue then moved him from where he had fallen in the roadway to behind his car and handcuffed him, ostensibly, for the protection of the two officers. DePue then re-entered the automobile and found a tin with a small amount of what appeared to be marijuana and removed it from the

vehicle. DePue continued his search and Stoltz asked Robbins the questions necessary to fill out a vehicle storage form requiring his name, address, type of radio, number of speakers, location of the jack and spare tire, etc. While DePue continued his search, Robbins is alleged to have said, "What you are looking for is in the back," to Sergeant Stoltz. Stoltz told DePue, who removed the keys from the ignition and unlocked the tailgate, opened it and opened the luggage compartment where he found a totebag and two bricks of marijuana. Robbins was placed in the California Highway Patrol vehicle, handcuffed behind his back with a seat belt through his arm. Sergeant Stoltz photographed the contraband while DePue administered the "Miranda Warning" which Robbins replied to with a lyric entitled "The Realworld Rag," reproduced in the Appendix hereto. This occurred at 2:15 A.M. some 30 minutes after the initial stop and search.

The bricks of marijuana and the unidentified vial were confiscated. At the end of the hearing to suppress evidence pursuant to § 1538.5 of the California Penal Code, Judge Randall ordered the still unidentified vial returned when District Attorney Uldall said, "It is no known controlled substance or narcotic, according to Valley Toxicologists. Defense counsel had the vial tested and identified by Hine Laboratory. It was determined to be Amyl Nitrite, a cardiovaso-dilator, with the effect of dilating the blood vessels and drastically increasing the flow of oxygen to the brain causing dizziness, impairment of the five senses and detachment from reality on the part of the person(s) inhaling the fumes, lasting for about 30 minutes.

Before trial began, defense counsel sought to re-open the hearing to suppress evidence based on evidence which would establish the effect of Amyl Nitrite by inhalation and would therefore make both officers' testimony unreliable. The judge refused to permit the hearing to be re-opened on the grounds that California law provides that a Motion to Suppress may be made only once. The ruling was made in spite of the fact that the identity of the substance and its euphoric effect were unknown at the time of the hearing.

At the hearing on the Motion to Suppress, Officer DePue testified that his basis for stopping the vehicle was that the driving was erratic. He felt it was erratic in great part because Mr. Robbins was driving too slowly in what he thought was a 55 MPH zone. At the trial, officer DePue admitted he was wrong, that in fact the speed limit was 30 or 35, the same speed he estimated the defendant to be driving originally. Defendant's counsel sought to reopen the hearing on the Motion to Suppress. That Motion was also denied.

During the course of the trial, petitioner sought to discharge his attorney and asked to continue his defense pro se. He stated to the Court that he felt his attorney was acting in collusion with the District Attorney and that his attorney was not entering certain unspecified information in the record of trial. Communication between the attorney and the client broke down to the point that the attorney called the client's competence into question, forcing a competency hearing and even at one point threatened physical violence toward the client. The attorney further declined to properly request a hearing on the client's constitutional complaint. The Motion was refused and trial continued after a hearing to determine petitioner's

competency to stand trial. Petitioner was found competent. He was also found guilty.

At sentencing petitioner offered constitutional complaint against the statutes which made possession of the vegetable, cannabis, a felony against the health and safety of the State of California. The judge spoke of his First Amendment rights on freedom of speech.

REASON FOR GRANTING THE WRIT

Point I. The Sixth Amendment Right To Defend Pro Se Should Be Applied Retroactively.

During the course of petitioner's trial, he sought to remove his counsel and conduct his own defense. RT 316-324. The Motion was denied by the trial Court.

This Court recently held in *Faretta* v. *California,* 422 U.S. 806 (1975), that a defendant in a criminal trial has the right to appear pro se in his own trial. The right was found to be implied in the Sixth Amendment. 422 U.S. at 819. A few earlier Supreme Court decisions as well as the views of the Federal Circuits and the States themselves lent weight to the finding of such a right. 422 U.S. at 812-832. The history of the British and American colonies also formed a background to the implied constitutional right of self representation.

The question here is whether this Court's decision in *Faretta* is to have retroactive application. The test for retroactivity has come to be well established in recent years. The major criteria being the "(a) purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect of a retroactive application on the new standards." *Stoval* v. *Denno,* 388 U.S.

293 (1967). See also *Tehan* v. *Shott,* 382 U.S. 406 (1966); *Linkletter* v. *Walker,* 381 U.S. 618 (1965). It should be noted the second two criteria have been disregarded and retroactive effect given where the "major purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdicts in past trials. . ." *Adams* v. *Illinois,* 405 U.S. 278 (1967), quoting *Williams* v. *United States,* 401 U.S. 646 (1971).

Certainly a major purpose of the *Faretta* Rule goes to the very heart of the truth finding process. The type of evidence that a defendant may elect to put on at his own trial to the extent it would differ from the strategy of forced counsel can be critical and often determinative of the outcome. No longer restricted by the traditional rule that the accused is bound by the tactical decisions of counsel, the defendant desiring to represent himself can often do a better job in presenting his case. The defendant's sincerity and recollection of events, usually the most valuable sources of relevant evidence in a trial can be heard and weighed by the trier of fact. In what was somewhat of an understatement, the majority in *Faretta* noted: "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense." 422 U.S. at 833. In contrast, forcing "a lawyer on a defendant can only lead him to believe that the law contrives against him." Id. The point is that an accused's resentment and hostility created by forced counsel and officers of the Court, often hinders and impedes the flow of information so necessary to the search for truth at trial, partially on the theory that the truth determining process was at

state. Other cases concerning the right of representation have been held to be retroactive. *McConnell* v. *Rhay,* 393 U.S. 2 (168), (Right to Counsel at Sentencing) *Arsenault* v. *Mass.,* 393 U.S. 5 (1968), (Right to Counsel at certain arraignments and at preliminary hearings, where guilty pleas are heard.)

Since it is clear that the purpose of the *Faretta* Rule clearly favors retroactivity, it should be unnecessary to consider the remaining factors. *Desist* v. *United States,* 394 U.S. 294 (1969). Nevertheless the main criteria also sustains the conclusion that *Faretta* should be retroactively applied.

The second element is the extent of reliance on the old standard. The *Faretta* decision at several points makes it apparent that its holding should have been forseeable to law enforcement authorities and the Courts. For example, each of the states, with few exceptions, had previously established the right to defend pro se. 422 U.S. at 818. So had the Federal Courts of Appeal. 422 U.S. at 816-817. An earlier Supreme Court decision, *Adams* v. *United States ex rel McCann,* 317 U.S. 269, had definitely foreshadowed and anticipated the *Faretta* decision. Thus there has not been justifiable reliance upon the old standard by the Courts and law enforcement officers. Certainly the few jurisdictions not affording the defendant the right should not be rewarded for a recalcitrant, lets-wait-until-after-its-decided approach, especially where the natural trend has long been to the contrary. See *Desist* v. *United States,* 399 U.S. 244, 277 (Fortas J, dissenting.)

Finally, retroactive application of *Faretta* would likely have little burdensome affect on the administration of justice. Since only a few states and no federal courts had failed to give the defendant a right to represent himself prior to *Faretta* the jurisdictions which would be affected by retroactivity would be few in number. Even in such jurisdictions, it is only the occasional defendant who elects to forego the guidance of an attorney. Thus there would be a handful rather than innumerable cases of claims to the constitutional right. Cf. *Michigan* v. *Payne,* 412 U.S. 47.

Point Two. The Decisions Of This Court Do Not Establish Across-the-Board Authority For Substantial Police Invasions Of Privacy Based Upon A "Rational Suspicion" Standard.

In *Terry* v. *Ohio,* 392 U.S. 1 (1968), this Court suggested police authority to stop and detain a criminal suspect "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." As this Court stated in *Adams* v. *Williams:* "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest simply to shrug his shoulders and allow a crime to occur or a criminal to escape. 407 U.S. 143, 145 (1972).

Some lower Courts, however, have taken *Terry* as an across-the-board authority for substantial police intrusions based upon "rational suspicion" that some violation of law, including non-criminal vehicular matters, has occurred or is about to occur. Thus in *People* v. *Superior Court (Acosta),* 20 Cal.App.3d 1085 (1971), a California District Court of Appeal, relying upon *Terry,* upheld a highway stop to allow the police officer to take a closer look at a can of Fanta brand orange drink in a passenger's hand, based upon the officer's "rational suspicion" that it was a can of beer:

> "The officer observed Padgett, a passenger in a motor vehicle, drinking from what appeared to be a beer can. While the container could have been a soft drink can, there was nevertheless a credible rational suspicion that it was not; there was an obvious suggestion that the conduct was in violation of the Vehicle Code. The officer accordingly had the right (we think the duty) to investigate further by stopping and temporarily detaining Acosta's car." Id. at 1091.

The Court thereupon upheld a subsequent weapons search which escalated into a conviction for dangerous drugs.

In a similar manner, the officer who arrested Petitioner herein observed his vehicle for a brief span of seconds, made a snap judgment that his driving was "erratic" and made an investigative stop. Although the officer's observations had been made through a dark evening fog, and from a different road, up to a quarter mile distant, no effort was made to confirm his judgment through close observation. No claim was made that the driving was in violation of the vehicle code and no citations ever issued.

No such police authority, to make highway stops in the middle of the night to investigate "erratic driving" or the identity of an aluminum can or a cigarette in a passenger's hand, is needed for the enforcement of the vehicle laws. Given probable cause to believe that a violation of the vehicle code has occurred, a highway stop is authorized and appropriate. Absent probable cause, exigent circumstances or some paramount government interest, e.g. *United States* v. *Brignoni-Ponce,* 95 S.Ct. 2574 (1975), police instrusions on the right of

the motorist to be let alone are vexatious and offensive to our notions of individual freedom.

Extending the *Terry* "rational suspicion" standard to the ordinary highway stop allows nearly unlimited police discretion to stop and detain motorists. It provides nearly blanket authority for a policeman to rudely invade the privacy of those whom he would choose as his targets, and slowly and subtly look for ways—by looking and smelling, asking questions or by a weapons search—to escalate the investigation into other more substantial criminal areas. Inexorably such discretion is exercised against racial minorities and those whose only transgression may be a non-conformist appearance or attitude.

Petitioner submits that *Terry* v. *Ohio,* was never intended to permit such unlimited police discretion and its rule must be limited to its purposes: crime control and protection.

Point Three. Upon Taking A Defendant Into Custody There Should Be An Affirmative Obligation To Advise The Suspect Of His Rights Rather Than Deliberately Waiting For The Accused To Make An Inculpatory Statement.

> "The central theme of modern police interrogation, is the application of tactics that will appeal to physiology of the average mind and to his normal emotive responses and susceptibilities." Teh, "The Criminal Suspects Right to Silence; a Hollow Shibboleth?", 4 University of Tasmania Law Review, 113, 131.

When the police set out to obtain incriminating statements from an accused there are many tactics that can be used in this endeavor. Not all statements need to be obtained by virtue of interrogation. In fact interroga-

tion has the distinct disadvantage of invoking the entire panoply of procedural rights discussed in this Court's opinion in *Miranda* v. *Arizona,* 384 U.S. 436 (1964). However, if the police did not attempt to interrogate the suspect, then they are under no obligation to advise a defendant of his rights. Thus the best method by which a statement may be obtained may well be not by interrogation by the police, but its opposite, silence.

In this case the police stopped petitioner on a public road. He was asked for his driver's license and registration. Upon smelling what the officer concluded to be marijuana, the officer proceeded to search the interior of the vehicle. The defendant was placed under arrest and handcuffed. The defendant became nauseous and sick. He was put up against the side of the vehicle while the officers proceeded to go about looking through the vehicle. The defendant allegedly volunteered the statement, "what you are looking for is in the back." At no time was the defendant advised of his rights as set out in the *Miranda* decision.

It is respectfully submitted that once a suspect has taken into custody there arises an affirmative duty to comply with the advice requirements of *Miranda* v. *Arizona.* Such a holding would not expand *Miranda,* but would rather accomplish its purpose recently articulated in *Michigan* v. *Tucker,* 417 U.S. 433 (1974). In *Tucker,* this Court discusses the fundamental rationale of the exclusionary rule in the context of the *Miranda* case.

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct,

> which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the Courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." 417 U.S. at 447.

The history of the evolving Constitutional Law of the Fifth Amendment exhibits a number of trends. See *Brown* v. *Mississippi,* 297 U.S. 278 (1936); *Fay* v. *Noia,* 372 U.S. 391 (1963); *Escobedo* v. *Illinois,* 378 U.S. 479 (1964); *Rogers* v. *Richmond,* 365 U.S. 534 (1961); and *Lisenda* v. *California,* 314 U.S. 219 (1941). However, beginning with this Court's reanalysis in *Michigan* v. *Tucker, supra,* as also reflected in this Court's logic in *Calandra* v. *United States,* 414 U.S. 338 (1974) and *Michigan* v. *Mosley,* 423 U.S. 96 (1975), it appears clear that the concern of this Court is not whether strict procedural rules were followed, but rather where whether the conduct complained of amounted to police behavior that is unacceptable in our system of criminal justice.

In the *Tucker* case, this Court held that the mere failure of the police to rigidly follow the proper words of the *Miranda* decision, was not fatal to their attempt to admit the evidence as the mistake was in good faith and was not an attempt by the police to play fast and loose with the Constitution. It is respectfully submitted that when the police set out by their silence to accomplish what they cannot do through interrogation, then they are engaging in the type of fast and loose behavior with the Constitution that this Court condemns. The

police set up a situation whereby they knew or should have known that the defendant would be making verbal statements. They had taken him into custody upon his becoming sick. They asked him intimidating questions, such as "Have you taken something detrimental to your health?" They propped him up against the car while they proceeded to conduct a search of the interior of the vehicle. They asked him questions concerning the filling out of a vehicle storage form. It was apparent from all of the facts and circumstances of the case, that the defendant would make an inculpatory statement unless properly advised as to his rights to remain silent and to counsel.

The action of the police are more important then the rigorous following of an advice of a rights card. To seek to deter improper police behavior requires that this Court establish the rule that upon taking a suspect into custody, he be advised of his right at that point and not at some later point when the police decided to formally set him down and begin formal interrogation. Such a rule does not expand *Miranda,* but rather limits it to the deterrent purpose this Court has recently held applies.

Point Four. A State May Not Limit By Statute And Court Opinions Construing That Statute, The Right Of A Defendant In A Criminal Case To Full And Fair Evidentiary Hearing On His Motion To Suppress Evidence.

Section 1538.5 of the California Penal Code, as interpreted and applied by the Courts of California, unduly constricts the right to a full and fair hearing on a Motion to Suppress evidence deemed excludable on constitutional grounds. Its procedural unfairness was twice demonstrated in the proceedings below.

At the time of the arrest of the petitioner, a vial of liquid, which petitioner used to start his engine, was taken by the arresting officers, opened and inhaled. It was confiscated by the police and not returned until after petitioner's Motion to Suppress came on for hearing and was denied. Upon return of the vial of liquid, petitioner's counsel had it analyzed by a toxicologist, who determined that it was amyl nitrite, the effect of which upon inhaling is to create a dilation of the blood vessels, greatly increasing the flow of oxygen to the brain and temporarily distorting the ability of the person who has inhaled the substance, to perceive reality. At the outset of the trial, petitioner sought to bring these facts to the attention of the trial judge and reopen the hearing on the Motion to Suppress, it being the contention of the petitioner that the inhalation of the amyl nitrite by the officers made it virtually impossible for them to perceive the events of which they testified at the hearing on the Motion to Suppress. The trial Court refused the request to reopen the hearing, noting that the matter should have been brought to his attention when the Motion to Suppress was heard, even though the vial of liquid was in the possession of the police and its identity and affects unknown until after the hearing on the Motion to Suppress.

At the hearing on the Motion to Suppress, Officer DePue testified that his basis for stopping the vehicle was that the driving was erratic. He felt it was erratic in great part because Mr. Robbins was driving too slowly in what he thought was a 55 MPH zone. At the trial, Officer DePue admitted he was wrong, that in fact the speed limit was 30 or 35, the same speed he estimated the defendant to be driving originally. Defendant's counsel sought to reopen the hearing on the Motion to Suppress. That Motion was also denied.

California Penal Code, Section 1538.5 provides the procedural framework in which a defendant may move to suppress evidence. A copy of said statute is reproduced and attached hereto in the Appendix. The section provides: "a defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of search or seizure on either of the following grounds:

"(1) The search or seizure without a warrant was unreasonable. . ."

The statute further provides: "whenever search or seizure Motion is made in the Municipal, Justice or Superior Court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact that is necessary to determine the Motion." Penal Code 1538.5(c).

Finally the statute provides that: "if, prior to the trial of a felony or misdemeanor, opportunity for this Motion did not exist or the defendant was not aware of the grounds for the Motion, the defendant shall have the right to make this Motion, during the course of trial in the Muncipal, Justice or Superior Court." Penal Code, Section 1538.5 (h).

Although the statute by its language appears to permit a defendant to bring matters to the attention of the judge which were not known at the time the original hearing on the Motion to Suppress was made, the California case law is to the effect that the pretrial Motion to Suppress can be made only once. *Madril* v. *Superior Court,* 15 Cal.3rd 73, 77 (1975). See also *People* v. *O'Brien,* 71 Cal.2d 394, 79 Cal. Rptr. 313, 456 P.2d 169 (1971). The rationale for this rule is to "reduce unnecessary waste of judicial time." *Madril* v. *Superior, supra,* quoting *People* v. *Superior Court* (Edmonds). 4 Cal.3d 605, 94 Cal.Rptr. 250, 483 P.2d 1202 (1971).

The officer's mistaken belief about the speed limit was a substantial factor in the Court's denial of the Motion to Suppress. It was also deemed important by the Court of Appeal in its opinion. Yet the trial Judge felt that state law did not permit a reopening of the Motion to Suppress hearing and the denial of the Motion was permitted to stand even though based on critical errors of fact for which the State itself was responsible.

The ability of the arresting officers to perceive the events surrounding the Search and Seizure was foundational to the State's right to charge petitioner. If the arresting officers had inhaled a drug as to which there was expert medical testimony indicating that the drug would have a substantial deleterious effect on their ability to perceive, then the defendant should be able to bring that fact to the attention of the judge that hears the Motion to Suppress. In this case, he was not because the liquid which was inhaled was confiscated by the police and kept in their possession until after the hearing of the Motion to Suppress.

The Fourth Amendment serves to protect the individual against the improper actions of government officials. *Lanza* v. *New York,* 370 U.S. 138; *Jones* v. *United States,* 362 U.S. 257; *Stefanelli* v. *Minard,* 342 U.S. 117. It is made applicable to the states through the due process clause of the Fourteenth Amendment. *Mapp* v. *Ohio,* 367 U.S. 634.

The Fourteenth Amendment to the Constitution of the United States provides that no person shall be deprived of his life, liberty or property without due process of law. Due process, if it has any content at all, at the very least means that an accused in a criminal proceeding be provided an opportunity to present his evidence and to be heard on his Motion to Suppress.

This hearing must be meaningful and full. It violates due process to require the defendant to put forth only such evidence as he knows at pretrial and to deny him the right to present further evidence unavailable to him due to police possession and control.

It equally violates due process to permit a Court decision to be immune from review and reconsideration when that decision is founded upon crucial errors of fact for which the State itself is responsible.

A State may not be law or judicial fiat authorize conduct which infringes upon the rights of the Fourth Amendment. *Sibron* v. *New York*, 392 U.S. 40 (1968); *Kerr* v. *California*, 374 U.S. 23. See also *West* v. *American Telephone and Telegraph*, 311 U.S. 223.

The State in this case by state law denied petitioner his right to a full and complete hearing on his Motion to Suppress. State law may not so infringe upon the fundamental right of due process.

Point Five. State Law May Not Arbitrarily Declare Fungible Vegetables To Be Poison, So Vile As To Be Declared Contraband, Subject To Seizure and Destruction And Arrest Of The Owner With Subsequent Scrutiny, And Forbid Commerce In Said Goods By Use Of A Sumptuary Law Which Has No Rational Or Apparent Reason.

JEFFREY RICHARD ROBBINS was searched, handcuffed, placed against his vehicle and felled by carbon monoxide fumes, arrested and thrown in jail because two police officers found a green leafy vegetable substance was seized and Jeffrey Robbins was tried, convicted, and sentenced to five years to life in San Quentin Prison for this possession and transportation of the vegetable, marijuana. He was bothering no one. He was committing no offense against the rights of others or their general welfare. Yet the legislature of California

has enacted legislation which incarcerated him with many violent criminals for possession and transportation of marijuana. This same law, which if enacted in 1774, would have made criminals out of George Washington and Thomas Jefferson. It is of the failure of these laws to meet the fundamental standards of constitutional propriety as defined in the Preamble to the Constitution and its Amendments, and the usurpation of powers, left to the people in the Constitution, by the State of California, in particular, that petitioner complains. He stated the substance of his complaint at the time of sentencing.[1]

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[1] "Pardon me if I'm wrong. I ask for the dismissal of all charges for the following reasons: First, this law is criminal not me. Secondly, it is my contention that the present laws against cannabis sativa, a vegetable, interfere with the unalienable rights to life, liberty and the pursuit of happiness. Thirdly, that these laws do not derive from the consent of a majority of those persons presently governed by California or the United States. Fourth, that these laws have become and are destructive of the rights demanded in the Declaration of Independence and guaranteed in the Federal Constitution. Fifth, these laws are in contravention with the Laws of Nature, the Magna Charta, the Declaration of Independence and the Constitution of these United States. Sixth, these laws are based on misinformation and lies and exist for the enrichment of a small minority and the oppression of the people as a whole.

The refusal of the Kings of England and France to give their assent to laws for the common good of their respective people was considered by those people to be just cause for violent revolutions. These laws should be abolished since they do not exist for the common good of the people and they interfere with the basic guarantees of freedom on which our great nation is based. That we are legally allowed to consume the virulent cancer causing poison of nicotine and the protein poison of alcohol, yet a harmless herb remains illegal is a travesty of justice. I seek proper redress in the Courts. In keeping with the spirit of the law and the consent of the governed, these laws which limit the freedom of every American should be abolished. In the interests of justice I ask again that all charges be dismissed.

Extensive studies dating back as early as 1893 have been conducted concerning the use of marijuana. See the Report of the Indian Hemp Drugs Commission (1893-1894). The culmination of the studies has been most recently the White Paper on Drug Abuse Task Force, September 1975. Dozens of reports span the interim. The data is essentially collected. The conclusion is the same. Marijuana produces no demonstrable physiological harm and the laws regulating its use, transportation and sale have no rational relationship to a justifiable state end. The White Paper reports:

"Marijuana is the most widely used illicit drug, with an estimated twenty percent of Americans over the age of eleven—twenty-five to thirty million people—having used it at least once. In short, marijuana has joined alcohol and tobacco as one of the widely used drugs in the United States." These figures are further corroborated by the National Commission on Marijuana and Drug Abuse in America, Problems in Prospective, the Second Report of the National Commission on Marijuana and Drug Abuse (March 1973) at p. 64. The National Commission reported that among users "no significant physical, biochemical, or mental abnormalities could be attributed solely to the marijuana smoking." Marijuana; a Signal of Misunderstanding, First Report of the National Commission on Marijuana and Drug Abuse (March 1972) at p. 61. The study has found specifically against the belief that marijuana directly causes criminal behavior. Rather the commission found that marijuana inhibits "the expression of aggressive impulses by pacifying the user, interferring with muscle coordination, reducing psychomotor activities and generally producing state of drowsiness, lethargy, timidity, passivity." Ib. pp.

70-71. It is also an interesting statistic that eighty-one percent of the people arrested for marijuana related crimes have never been convicted of a drug related crime. Marijuana; A Signal of Misunderstanding, Appendix II at p. 622. See also *Marijuana: Beyond Misunderstanding,* Final Report of the California Senate Select Committee on Control of Marijuana, 1974.

The experts further tend to be in agreement that alcoholism is a much more serious and significant problem then all other forms of drug abuse combined. See the Canadian Commission of Inquiry into the Non-Medical Use of Drugs. Interim Report 1970 p. 39.

There is a substantial conflict in the Courts of this country concerning the Constitutional validity of marijuana laws. It is noteworthy however, that in recent years there has been substantial judicial support of the Constitutional challenge that petitioner makes in this case. Most recently the Supreme Court of Alaska in *Ravin* v. *Alaska,* 537 P.2d 494 (1975) held that state law proscribing the private possession of marijuana violated an individual's right to privacy and that there was no rationale basis on which the legislature could make possession of marijuana criminal. That Court relied on this Court's privacy decisions in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Stanley* v. *Georgia,* 394 U.S. 557 (1969) and *Roe* v. *Wade,* 410 U.S. 113 (1973).

In so holding the Alaska Supreme Court reviewed in great detail the bases currently tendered as justification for state prohibition of possession of marijuana. They hold:

> "it appears that the use of marijuana, as it is presently used in the United States today, does not

> constitute a public health problem of any significant dimensions. It is, for instance, far more innocuous in terms of physiological and social damage than alcohol or tobacco." Id. p. 506.

In declaring the law unconstitutional, the Court notes that "the state can not impose its own motions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals." Id. p. 509.

Although no other State Supreme Court or Federal Court has declared a marijuana law unconstitutional there is increasing support by various high Court judicial officers throughout the country. In reversing a marijuana conviction, Justice Kavanaugh, concurring with the majority of the Michigan Supreme Court states, "I find that our statute violates the Federal and State Constitutions in that it is an impermissable intrusion on the fundamental right to liberty and pursuit to happiness, and is unwarranted interference in the right to possess and use private property." *People* v. *Sinclair,* 387 Mich. 91, 194 N.W.2d 878, 896 (1972). In *State* v. *Kantner,* 493 P.2d 306, 312, concurring Justice Abe states: "I believe that the right to enjoyment of life, liberty and the pursuit of happiness includes smoking of marijuana, and ones right to smoke marijuana may not be prohibited or curtailed unless such smoking affects the general welfare." See also the dissent of Levinson, J. Id. pp. 313-318.

In the only opinion relating to the question of sale, Justice T. G. Kavanaugh concurring in *People* v. *Lorentzen,* 194 N.W. 2d 827, 834, states: "The right to possess and use something, however, has little meaning unless one also has the right to acquire it, and hence

proscription of sale cannot be reconciled with a right to possess and use."

"It may be some legitimate public interest served by the regulation of traffic in marijuana, but a statute which absolutely forbids the sale of marijuana is as offense to the right of privacy and the pursuit of happiness as a statute which forbids its possession and use." See also 313 A.D. Edict of Milan; clause 39, Magna Carta.

Historically our marijuana laws are the product of prejudice and ignorance: prejudice against the habits of Mexican-Americans and other dark skinned Americans, and ignorant belief that their pleasure habits are somehow deprived and less worthy than white anglo-saxon pleasure habits. Marijuana: A Signal of Misunderstanding, at p. 13; App.vol.1 at pp. 482-484. The marijuana laws, enacted and re-enacted without public attention and debate, are not deserving of the respect and presumptions ordinarily associated with legislative conduct.

It is only now that we have come to realize the legal monster created by this legislative misconduct and malfeasance. The marijuana laws are self-destructive and contrary to the high ideals upon which our society is based. Our Constitution was created "in Order to form a more perfect Union" of our people. *United States Constiution, Preamble.* Yet our marijuana laws, making felons out of a whole generation of Americans, do more to destroy that Union and the respect for law which we cherish than any other laws in this history of our country.

The use of marijuana, despite the laws making its possession a felony, is a part of the American way of

life. This Court can not alter that by ignoring its presence. It is the responsibility of the Court to rule on the great issues of our time and this certainly is one issue which affects as many if not more people than any issue to come before this Court.

CONCLUSION

For these reasons a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE, *Plaintiff and Respondent,*

v.

JEFFREY RICHARD ROBBINS, *Defendant and Appellant.*

1/Crim. 14387

(Superior Court No. 10357)

THE COURT:

Jeffrey Richard Robbins appeals from a judgment of imprisonment which was rendered after a jury found him guilty of possession of marijuana (Health & Saf. Code, § 11357), possession of marijuana for sale (Health & Saf. Code, § 11359) and transportation of marijuana (Health & Saf. Code, § 11360).

Two highway patrol officers saw appellant's car traveling at about 30 miles per hour in a 55 mile-per-hour zone on Interstate 80. At the same time, the vehicle was seen to be drifting erratically across lanes; at one time approximately the full width of the vehicle was to the left of the center lane of the freeway. The officers stopped the car, whereupon appellant immediately stepped out. Appellant was requested to produce a driver's license and vehicle registration. When appellant entered his car to obtain the certification of registration, one of the officers detected the smell of burning marijuana coming from the car. The car was then searched. One of the officers found marijuana and paraphernalia. Thereafter, appellant volunteered the statement that what the officers were looking for was "in the back." In the rear compartment of appellant's car the officers then found approximately 30 pounds of marijuana.

• Before Caldecott, P.J., Rattigan, J., and Christian, J.

Appellant testified at trial that the marijuana was not his and that it had apparently been placed in the car by an unknown female who had asked him to drive her to Los Angeles.

Appellant contends, citing *Faretta* v. *California* (1975) 422 U.S. 806, 45 L.Ed.2d 562, that a deprivation of due process occurred when the court declined to allow appellant to discharge his counsel during the trial. The Attorney General contends that the holding of the United States Supreme Court in *Faretta* should not be given retroactive effect. After the briefs in the present appeal had been filed, the California Supreme Court rendered its decision in *People* v. *McDaniel* (1976) 16 Cal.3d 156, holding that the right of self-representation announced in *Faretta* is to be applied only prospectively in those cases where in an accused seeks to assert his right of self-representation in a trial which has commenced after June 30, 1975. The trial in the present action commenced on April 22, 1975. Therefore, appellant's contention is unavailing.

Appellant contends that the officer was not justified in stopping the car or in searching it. But it was reasonable for the officer to stop the car when he saw it weaving about upon the highway (*People* v. *Boddie* (1969) 274 Cal.App. 2d 408). Then, upon smelling the odor of burned marijuana, the officer had reasonable cause to believe that appellant was in possession of marijuana (*People* v. *Fitzpatrick* (1970) 3 Cal.App.3d 824). The ensuing search of the vehicle was lawful (*People* v. *Laursen* (1973) 8 Cal.3d 192).

Appellant contends that when the court declared that there was a doubt as to appellant's mental capacity it acted improperly in considering the reports of the medical examiners without the aid of a jury (citing Pen. Code, §§ 1368, 1369). It is true that appellant would apparently have been entitled to a jury to determine the question of his competency to stand trial if a demand had been made. But here, no such request was addressed to the court. "Absent a demand by the defendant, a jury trial under section 1368 is not required." (*People* v. *Sanchez* (1969) 275 Cal.App.2d 226, 232). The court acted correctly in receiving the reports of the medical examiners and determining the question of competency without the assistance of a jury.

Appellant contends that the court erred in restricting the cross-examination by the defense of the court appointed psychiatrist on the question of appellant's mental capacity. A possible defense of diminished capacity was pertinent to the charge of possession of marijuana for sale. That circumstance was evidently understood by the court, and testimony concerning appellant's paranoid feelings was received. But in an extensive cross-examination defense counsel appeared purposely to avoid the question of diminished capacity. It is possible that the two medical examiners could have produced additional evidence bearing on the issues of the case. But the court did not exclude any apparently pertinent evidence and defense counsel made no offer of proof showing "the substance, purpose, and relevance [of any additional matter that he wished to pursue.]" (Evid. Code, § 354, subd. (a).) Therefore, appellant cannot be heard to maintain on appeal that the court should have allowed broader latitude in the cross-examination of the two psychiatrists. (*People* v. *Jones* (1960) 177 Cal. App. 2d 420.)

Appellant contends, citing *People* v. *Heard* (1968) 266 Cal.App.2d 747, that the trial court's handling of a motion to suppress evidence under Penal Code section 1538.5 was deficient in that it showed reluctance "to resolve factual questions effectively." This contention is obscure: there was substantial evidence supporting the court's determination that the search was lawful and any factual conflicts were resolved adverse to appellant's position by the court's order denying the motion to suppress evidence. (See *People* v. *Peterson* (1973) 9 Cal.3d 717.)

The judgment is affirmed.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FOUR

1/Crim. No. 14387

People of the State of California,
Plaintiff and Respondent,

vs.

Jeffrey Richard Robbins,
Defendant and Appellant.

(filed June 30, 1976)

BY THE COURT:

The motion to vacate judgment and set new filing date is granted. The opinion filed June 1, 1976 in the appeal herein is ordered vacated and refiled.

CALDECOTT, P.J.

Dated: June 30, 1976

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FOUR

No. 1/Crim. 14387

(Caption omitted in printing)

BY THE COURT:

The written opinion of this court, filed June 30, 1976, is modified as follows: On page 4, delete the last line (the disposition of the case), and substitute the following.

In the circumstances presented in this record possession of marijuana (Health & Saf. Code, § 11357) is an offense included within possession of marijuana for sale (Health & Saf. Code, § 11359). The lesser offense cannot stand as a separate conviction. Moreover, the two remaining counts represented a single act; hence the punishment under section 11359 must be stayed. (*People* v. *Sanders* (1967) 250 Cal.App.2d 123.)

The judgment is reversed as to the conviction of violation of Health & Safety Code section 11357; the punishment for violation of Health & Safety Code section 11359 is stayed, the stay to become permanent upon completion of the term for violation of Health & Safety Code section 11360. In all other respects the judgment is affirmed.

The petition for rehearing is denied.

CALDECOTT, P.J.

Dated: July 22, 1976

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

(Caption omitted in printing)

Modification of Opinion

BY THE COURT:

The written opinion filed on June 30, 1976, and modified on July 22, 1976, is further modified on page 1 thereof, by changing the first two sentences of the second paragraph to read as follows:

"Two highway patrol officers saw appellant's car traveling at about 30 miles per hour in a 55 mile-per-hour zone. At the same time, the vehicle was seen to be drifting erratically; at one time approximately the full width of the vehicle was to the left of the center line of the roadway."

CALDECOTT, P.J.

Date: July 27, 1976

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

Order Denying Hearing After Judgment by the Court of Appeal

1st District, Division 4, Crim. No. 14387

Order Due September 20, 1976

PEOPLE

v.

ROBBINS

(filed September 15, 1976)

Appellant's petition for hearing DENIED.

WRIGHT, *Chief Justice*

§ 1538.5 Motion to return property or suppress evidence

(a) Grounds

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on * * either of the following rounds:

(1) The search or seizure without a warrant was unreasonable * * *.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) First hearing

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Evidence

(c) Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) Effect of granting motion

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

(e) Return of property

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section

or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) Felony; motion at preliminary hearing

(f) If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) Misdemeanor; pre-trial motion at special hearing

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) Motion at trial

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court. * * *

(i) Felony; renewal of motion at special hearing; review

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search and seizure which

shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) Relitigation of question after grant of motion; new evidence, review

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the . . . . evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for a return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the preliminary hearing request in the superior court a special hearing in which case the validity of the search and seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the

people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o) * * *, unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) Release of defendant pending resumption of proceedings in trial court

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j) * * *, the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318 unless (1) he is

charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged from actual custody upon bail.

(*l*) Stay; time for trial; dismissal; continuance; bail or release

(*l*) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate course of * * * this state * * * of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o) * * *, the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of any appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion

of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

(m) Exclusive pre-trial remedy; review on appeal after conviction

(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Motions on other grounds; existing law and procedure

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the isue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

(*o*) People's petition for mandate or prohibition; notice of intention

(*o*) Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.

* * * * * * * * * *

THE REALWORLD RAG

In a world full of thieves and liars, dopehounds in sundry strange attires, we all know what greed inspires.
The real world was a drag, so now we'll start the Realworld Rag.

What made me do it? Was it God or the Devil?
What brought you to it? Was it part of the revel?
What if we blew it? Was it on the level?

Horrified that I'd hide what was inside.
Now you know what snapped me go was my trapped ego.
For a nut, either/or, neither/nor, and/or/but, was not what
Sought fullfilling was an American unwilling to share poisons so killing.

And yet, I'm as real as can be. Its the spirit must be free.
Yes, I'm as real as can be. Its the Self you must see.

Acting oh so funny to every loving honey chasing dope or money.

Used favors and advice, fruits of labor and/or vice, forgetting what was nice, never thinking twice.
Created what was earned, often got burned, see what I learned.
The game some folks play is, "Take what they can and that's when they say",

STOP THE MUSIC, DON'T GO AWAY MAD, JUST GO AWAY!!!!

Think that's cold? Sometimes love confounds you.
Think that's bold? Sometimes nerve astounds you.
Think that's old? Sometimes magic surrounds you.

Now listen well. I went through hell and came back to tell
Found Hell right here on Earth, heaven too for what its worth.
Didn't feel fine until I stood up to shine in my light divine.
When I became aware, the way was clear beyond my fear.

Yes, I'm as real as can be. Need to live lovingly.
Yes, I'm as real as can be. Don't want an enemy.

Hesitate about your fate. My life can't wait until its too late.
But don't call me weird because I'm not scared to get it cleared.
Might want to dust me, maybe just bust me, easier just trust me.
Say you didn't want to, how was it you got to, just who chased whom?

What made me do it? It was God and the Devil.
What brought you to it? It was part of the revel.
What if we blew it? It was on the level.

A world full of performers for hire, bizarre persons for odd desire, do anything their love might require.

Spend the rest of my life being free performing my ragtime cacaphony.

Supreme Court

of the

United States

October Term, 1976

No. 76-617

JEFFREY RICHARD ROBBINS, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Subject Index

Table of Authorities Cited

Cases

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-817

JEFFREY RICHARD ROBBINS, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, filed on June 1, 1976, vacated and refiled on June 30, 1976, and modified on denial of petition for rehearing on July 22, 1976, is appended to the Petition for Writ of Certiorari.

On September 15, 1976, the California Supreme Court denied pentitioner's application for a hearing without opinion.

JURISDICTION

Petitioner would invoke this Court's appellate jurisdiction under Title 28, United State Code sections

2101 and 2104. Jurisdiction is conferred by Title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

1. Whether *Faretta v. California,* 422 U.S. 806 (1975), is to be applied retroactively.

2. Whether a rational suspicion, rather than probable cause, authorizes detention of a motorist for a traffic violation.

3. Whether police are required to "Mirandize" an accused who is not questioned.

4. Whether the state court's refusal to relitigate petitioner's motion to suppress illegally seized evidence denied a full and fair hearing on Fourth Amendment claims.

5. Whether the state may constitutionally prohibit possession and transportation of marijuana in a commercial context.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments Four, Five, Six and Fourteen, section 1.

STATEMENT OF THE CASE

The District Attorney of Solano County accused petitioner Jeffrey Robbins of possession, possession for sale, and transportation of marijuana and of

driving under the influence of a drug, by an information filed on January 23, 1975 (CT 8-9).[1] Petitioner pleaded not guilty (CT 11), was tried by a jury (CT 13), and convicted of possession, possession for sale, and transportation of marijuana, but acquitted on the remaining charge (CT 48-49).

Proceeding eastbound on Interstate Route 80 at 1:45 a.m. on January 5, 1975, California Highway Patrol Officer DePue noticed petitioner driving in the same direction along parallel Nelson Road (RTS 4-5). As DePue observed petitioner at a distance of about one tenth of a mile (RTS 5), Robbins twice crossed the center line of the roadway (RTS 6). Approaching a curve, petitioner's automobile drifted into the oncoming lane the full width of the vehicle, its right wheels reaching the center line (RTS 6). Robbins returned his auto to the right side of the road but while negotiating the curve drifted three feet across the center line (RTS 6-7). DePue also noted that petitioner was driving 30 miles per hour in what DePue thought was a 55 miles per hour zone (RTS 6). Judging petitioner's driving to be erratic, DePue and Sergeant Stoltz followed and stopped him "to determine why it had left—was operating outside of a marked road lane." (RTS 7).

Petitioner immediately alighted, meeting DePue midway between their vehicles (RTS 8). The officer asked for Robbins' operator's license and ownership

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[1] "CT" refers to the Clerk's Transcript on Appeal; "RTS" refers to the Reporter's Transcript of the Suppression Hearing; "RT" refers to the Reporter's Transcript of trial proceedings.

registration (RTS 9).[2] Petitioner, perspiring profusely, swallowing rapidly, his eyes bloodshot and watery, experienced difficulty in removing the license from his wallet (RT 39-40). When Robbins opened his car door to retrieve his registration, DePue, standing three to four feet behind him, smelled the familiar odor of burned marijuana within the vehicle (RTS 9-10; RT 40-42). The officer also noted smoke in the car's interior (RT 43).

DePue then pat searched Robbins for weapons (RT 42; RTS 10), finding only a vial of malodorous liquid (RTS 11, RT 43). DePue next entered the passenger compartment to recover a pair of tweezers observed on the front seat (RT 43, RTS 12). The patrolman previously had observed such devices used to hold marijuana roaches (RT 43). After Robbins vomited (RT 44; RTS 12), DePue reentered petitioner's auto and found two pairs of tweezers on the dashboard, one with a burned hand rolled cigarette butt, and a cookie tin on the rear floor (RT 44-45, 47). Inside the tin were two packs of cigarette papers and a plastic baggie containing marijuana (RT 48, 145).

While Officer DePue searched the passenger compartment, petitioner remarked to Sergeant Stoltz

[2]California Vehicle Code section 4454 requires owners to maintain the registration or a facsimile copy in their vehicle. Vehicle Code section 2804 authorizes California Highway Patrol officers, "upon reasonable belief that any vehicle is being operated in violation of any provisions of this code" to "require the driver of the vehicle to stop and submit to an inspection of the . . . registration card." Vehicle Code section 12951 obliges a driver to carry his license while driving and to present it upon demand of a peace officer enforcing traffic regulations.

"What you are looking for is in the back" (RT 120). Stoltz repeated this to DePue. Robbins was placed in the patrol vehicle while DePue unlocked the back of Robbins' station wagon, raised the floorboard and removed two marijuana bricks and a tote bag containing some 30 pounds of marijuana (RT 50-53, 140). Inspector Grundy of the Solano County Drug Abuse Bureau placed the street value of the seized contraband at approximately $8,000.00 (RT 190), a quantity sufficient to supply an individual user for 17 years (RT 189).

About ten minutes after the contraband was discovered Robbins was advised of his *Miranda* rights (RTS 21; RT 58). He was not interrogated by the arresting officers (RT 58). Prior to the admonition petitioner told DePue he did not wish "to take a fall for this," (RT 58), and asked Stoltz what it would take "to get out of this?" The sergeant replied that disposition would follow booking. Robbins said "In my left pocket, check it." Petitioner's left pocket contained $521.00 (RT 122).

ARGUMENT

I

PETITIONER WAS NOT IMPROPERLY DENIED HIS SIXTH AMENDMENT RIGHT OF SELF-REPRESENTATION

On April 25, 1975, the fourth day of trial, petitioner sought to dismiss retained counsel (RT 316). As he did not seek to substitute other counsel, petitioner apparently recognized that "I would have to

continue my defense." (RT 322). The trial judge denied the motion as untimely (RT 320-321). The jury convicted Robbins on May 1, 1975 (CT 48-49), and the court sentenced him on May 30, 1975 (CT 67, 70).

One month later this Court announced its decision in *Faretta v. California,* 422 U.S. 806 (1975). On appeal petitioner contended that the trial court had denied his Sixth Amendment right of self-representation, recognized in *Faretta.* The intermediate state appellate court rejected his contention on the authority of *People v. McDaniel,* 16 Cal.3d 156, 168 (1976), in which the California Supreme Court limited the application of *Faretta* to state trials beginning after June 30, 1975. Appendix to Petition, 2a.

Petitioner asks this Court to overturn his conviction by giving *Faretta* retroactive effect. Petition, 6-9. He must fail for several reasons: *Faretta* should apply only prospectively to trials commenced after June 30, 1975, the date of that decision; retroactive application of the *Faretta* rule would not avail petitioner because his request for self-representation, if not equivocal, was untimely, and because the record affirmatively demonstrates that, while competent to stand trial, petitioner lacked the mental ability to defend himself.

A. Faretta v. California should not be applied retroactively.

Although *Faretta* found the right of self-representation implicit in the structure of the Sixth Amendment, 422 U.S. at 819, petitioner correctly perceives that its application is to be determined according to

the criteria elaborated in *Stovall v. Denno,* 388 U.S. 293, 297 (1967). Petition, 6. The question is not what the Sixth Amendment has always meant but to what extent it has been made applicable to the States by the Fourteenth Amendment. Sixth Amendment provisions have been selectively incorporated. *Duncan v. Louisiana,* 391 U.S. 145, 148 (1968). Where the reliability of the fact-finding process has thereby been enhanced, application of a specific Sixth Amendment right has been made retroactive. *E.g., Arsenault v. Massachusetts,* 393 U.S. 5 (1968); *McConnell v. Rhay,* 393 U.S. 2 (1968); *Roberts v. Russell,* 392 U.S. 293, 295 (1968); *Pickelsimer v. Wainwright,* 375 U.S. 2 (1963). Where that purpose would not be measurably served, however, application of an explicit Sixth Amendment right—trial by jury—has been made prospective. *DeStefano v. Woods,* 392 U.S. 631, 635 (1968).

The Court made clear in *Faretta* that it was deciding for the first time that "the Constitution forbids a state from forcing a lawyer upon a defendant. . . ." 422 U.S. at 815. Accord, *People v. McIntyre,* 364 N.Y.S.2d 837, 842, 342 N.E.2d 322, 325 (1974). Accordingly, the retroactivity or nonretroactivity of *Faretta* is not governed by the language or history of the Sixth Amendment but by these criteria:

> "(a) The purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall v. Denno,* 388 U.S. 293, 297 (1967). Ac-

cord, *Halliday v. United States,* 394 U.S. 831, 832 (1969); *Tehan v. Shott,* 382 U.S. 406, 410 (1966).

"Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist v. United States,* 394 U.S. 244, 249 (1969). Accord, *Gosa v. Mayden,* 413 U.S. 665, 679 (1973) (opinion of Mr. Justice Blackmun). New rules have been made retroactive regardless of good-faith reliance upon prior law and their impact upon the administration of justice where the " 'major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials. . . .' " *Adams v. Illinois,* 405 U.S. 278, 280 (1972) (opinion of Mr. Justice Brennan), quoting *Williams v. United States,* 401 U.S. 646, 653 (1971). *E.g., Roberts v. Russell,* 392 U.S. 293, 295 (1968); *Jackson v. Denno,* 378 U.S. 368 (1964). On the other hand, retroactivity has been denied where the Court has been unable to conclude that the newly proscribed practice of the past "presents substantial likelihood that the results of a number of those trials were factually incorrect. . . ." *Williams v. United States, supra,* 655 n.7. *E.g., Mackey v. United States,* 401 U.S. 667, 675 (1971); *Desist v. United States, supra.*

Assuring the reliability of criminal convictions was not the purpose of *Faretta;* it was the price paid for preserving individual autonomy. See 422 U.S. at 834. The Court acknowledged that "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," and that only in "rare instances" might an accused's efforts conceivably surpass his attorney's. *Ibid.* Reliable verdicts, and community acceptance of verdicts, are not enhanced by making retroactive the constitutional right to make a fool of oneself. Where the new rule does not guarantee "the very integrity of the fact-finding process" and, consequently, there exists no "clear danger of convicting the innocent," retroactivity is inappropriate. *Johnson v. New Jersey,* 384 U.S. 719, 728 (1966). *Faretta* impairs rather than improves the fact-finding process. Retroactive application of *Faretta* would be irreconcilable with decisions extending the right to counsel retroactively. *E.g., Arsenault v. Massachusetts,* 393 U.S. 5 (1968); *McConnell v. Rhay,* 393 U.S. 2 (1968); *Pickelsimer v. Wainwright,* 375 U.S. 2 (1963).

As if to illustrate the pitfalls of self-representation petitioner, who appears before this Court *pro se,* overlooks favorable precedent. In *People v. Holcomb,* 235 N.W.2d 343, 347 n.7 (Mich. 1975), a divided Michigan Supreme Court accorded *Faretta* "full retroactive effect" "unless and until the United States Supreme Court limits the application of that right" because

> "To deny retroactive effect to the right to proceed *pro se* on the ground that the right to counsel at trial enhanced the reliability of the fact-finding process while the right to proceed *pro se* inhibits or lessens the probability that the defendant's case will be adequately presented would be to reject the premise of *Faretta.* . . ."

And compare Hamilton v. State, 351 A.2d 153 (Md.Ct.Spec. App. 1976).

In concluding that the right of self-representation was too basic to be limited in time, the Michigan majority failed adequately to consider two fundamental principles governing retroactivity: (1) " 'the Constitution neither prohibits nor requires retrospective effect,' " *Robinson v. Neil,* 409 U.S. 505, 507 (1973), quoting *Linkletter v. Walker,* 381 U.S. 618, 629 (1965), and (2) "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved." *Johnson v. New Jersey,* 384 U.S. at 728. This misapprehension, leading to a total failure to consider the impact upon the administration of justice of the retrospective application of *Faretta,* renders *Holcomb* unpersuasive.

Since denial of self-representation does not necessarily deny a fair trial, 422 U.S. at 837 n.2 (dissenting opinion of Chief Justice Burger); *People v. Sharp,* 7 Cal.3d 448, 460, 499 P.2d 489, 496 (1972), and since *Faretta's* purpose clearly favors nonretroactivity, the issue may be resolved without resort to the remaining factors of state reliance and the burden on the administration of justice. *Michigan v. Payne,* 412 U.S. 47, 55 (1973). However, both factors favor prospectivity.

California's view that the Sixth Amendment did not guarantee the right of self-representation was "justified," *DeStefano v. Woods,* 392 U.S. at 635, and of "unquestioned legitimacy," *Tehan v. Shott,* 382 U.S. at 417, since this Court had "not hinted at a

contrary view for 185 years," *Faretta v. California,* 422 U.S. at 835 (dissenting opinion of Chief Justice Burger). Indeed, the *Faretta* majority conceded "a strong argument can surely be made that the whole thrust of those decisions [extending the right to counsel] must inevitably lead to the conclusion that a state may constitutionally impose a lawyer upon even an unwilling defendant." 422 U.S. at 833. California accepted that argument. *People v. Sharp,* 7 Cal.3d at 454-55, 499 P.2d at 492-93. "Under these circumstances, judicial reliance on prior law was certainly justifiable." *Michigan v. Payne,* 412 U.S. at 56.

Petitioner insists that California's reliance upon the old standard was unjustified because *Adams v. United States, ex rel McCann,* 317 U.S. 269 (1942), clearly foreshadowed *Faretta.* Petition, 8. This argument is answered in *Faretta,* 422 U.S. at 814-815:

> "The *Adams* case does not, of course, necessarily resolve the issue before us. It held only that 'the Constitution does not force a lawyer upon a defendant.' *Id.* at 279. Whether the Constitution forbids a State from forcing a lawyer upon a defendant is a different question." (Footnote omitted).

Petitioner next asserts that reliance upon the former constitutional rule is limited to a "few" "recalcitrant" jurisdictions. Petition, 8. It is true that a number of state constitutions, like California's, arguably authorize *pro se* representation. Comment, 59 Calif.L.Rev. 1479, 1494 (1971); A.B.A. Standards Relating to the Function of the Trial Judge, p. 85 (approved draft, 1972); *People v. Sharp,* 7 Cal.3d at 457,

499 P.2d at 494-495. The extent of reliance upon laws conflicting with *Faretta* cannot be gauged simply by reference to state constitutional texts, however. "In practice, . . . state courts have so restricted the right that it becomes as difficult for a state defendant to represent himself as for a federal defendant." Comment, 59 Calif.L.Rev. at 1494.

Retroactive application of *Faretta* would adversely affect the administration of criminal justice. Whatever the number of retrials thereby necessitated, each would mock justice. Some defendants, having overturned their convictions because they were denied self-representation, would accept counsel on retrial. Other defendants would defend themselves, too often with the undesirable consequences foreseen in *Faretta*. 422 U.S. at 834 n.46. Many, whose guilt was reliably determined, simply could not be retried.

> "The effect on the administration of justice would be traumatic. Any defendant who at one time requested to represent himself on the record in a state court criminal proceeding could file for a new trial and under the rationale of *United States v. Price,* [474 F.2d 1233 (9th Cir. 1973)], no prejudice need be shown, only an unequivocal demand." *Houston v. Nelson,* 404 F.Supp. 1108, 1115 (C.D.Cal. 1975).

Contrary to petitioner's assumption, retroactive application of *Faretta* would comprehend more than a few defendants in a few states. Petition, 8-9. Beyond constitutionalizing the right of self-representation, *Faretta* set forth at least one standard for its implementation: The accused's "technical legal knowledge, as such, . . . [is] not relevant to an assessment of his knowing exercise of the right to defend himself." 422 U.S. at 836. In jurisdictions recognizing self-representation as a statutory or constitutional right it is certain that trial judges frequently insisted upon counsel by reason of the defendant's total ignorance of the law. Convictions in those cases would be invalidated by retroactive application of *Faretta.*

As Mr. Justice Blackmun emphasizes, the contours of the *Faretta* right remain largely undefined. 422 U.S. at 852. Depending upon forthcoming answers to questions posed in the Justice's dissent, retroactive application of *Faretta* could affect additional convictions. Virtually every existing federal and state conviction would be jeopardized by an affirmative response to Mr. Justice Blackmun's question "Must every defendant be advised of his right to proceed *pro se?*" *Ibid.*

Prospectivity at once preserves convictions of unquestionable reliability and affords the Court the greatest latitude in defining the right of self-representation. *Jenkins v. Delaware,* 395 U.S. 213, 218 (1969). Non-retroactivity is also warranted by the opportunity of pre-*Faretta* defendants to show that, in the peculiar circumstances of their cases, denial of self-representation deprived them of fair trials. *People v. Sharp,* 7 Cal.3d at 460, 499 P.2d at 496; *Houston v. Nelson,* 404 F.Supp. at 1115. *Compare, Michigan v. Payne,* 412 U.S. at 55; *Stovall v. Denno,* 388 U.S. at 299, and *Johnson v. New Jersey,* 384 U.S.

at 730, declaring that survival of due process claims further justifies non-retroactivity.

B. Petitioner's request for self-representation was untimely.

On the fourth day of trial petitioner attempted to dismiss his attorney. He did not seek a continuance or to substitute another lawyer (RT 316-324). When defense counsel suggested a motion for mistrial petitioner exclaimed "No, I would have to continue my defense." (RT 322). The trial court refused to permit counsel's withdrawal because "This is not a timely motion." (RT 320-321). Petitioner was convicted several days later.

Assuming, *arguendo,* that petitioner's was an unequivocal assertion of the right of self-representation, his request was properly denied as untimely. Having attached the right to self-defend to the Federal Constitution, *United States v. Plattner,* 330 F.2d 271, 273 (2d. Cir. 1964), the United States Court of Appeals for the Second Circuit observed in *United States ex rel. Maldonado v. Denno,* 348 F.2d 12, 15 (2d. Cir. 1965):

> "Once the trial has begun with the defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalance the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance."

In *Faretta* the Court noted that "well before the date of trial, . . . *Faretta* requested that he be permitted to represent himself." 422 U.S. at 807. Subsequently, the Second Circuit adhered to *Maldonado:*

> "The recent Supreme Court decision, *Faretta v. California,* . . . [citation] casts no pall on our *Maldonado* ruling. *Faretta* does not involve motions made after the commencement of trial and in that decision the Court cited (without disapproval) *Maldonado* which does." *Sapienza v. Vincent,* 534 F.2d 1007, 1010 (2d. Cir. 1976). Accord, *State v. Nix,* 327 So.2d 301, 354 (La. 1976).

Considering that the end of the trial was near, that the trial judge disagreed with petitioner's complaint of counsel's inadequacy (RT 320), and that petitioner fails to explain how continued legal representation prejudiced him, the trial court's ruling must be upheld.

C. The record affirmatively demonstrates that petitioner was not mentally competent to undertake his own defense.

When petitioner attempted to discharge his attorney, counsel requested a psychiatric assessment of his client's present capacity to stand trial (RT 316). Defense counsel voiced concern over petitioner's "screaming about guns" and his creation of a courtroom scene (RT 322). Petitioner, who later testified "I've been paranoid for 12 years," (RT 353), explained "I am honestly concerned for my own safety. A number of the gentlemen in the courtroom who are wearing coats that's pulled up to disguise firearms." (RT 322). He insisted on "all the individuals seated

in the audience, all the jurors having nothing on, so I don't get shot." (RT 322).

Pursuant to California Penal Code section 1368 the trial court thereupon appointed two psychiatrists to examine petitioner "to determine his capacity to understand the nature and purpose of the proceedings against him and to assist counsel in the conduct of his defense in a rational manner." See *Pate v. Robinson,* 383 U.S. 375 (1966).

Dr. Murray Eiland reported that while "there is a significant paranoid component to his thinking," petitioner was capable of continuing his trial (CT 19). Dr. Eiland testified to the same effect (RT 369, 375). Dr. H. E. McGrew found petitioner "a very bright, chronically disturbed young man who probably has a psychotic core but who is under fairly good control right now." (CT 20). Dr. McGrew detected "paranoid thinking," (RT 377), but, after "some reservations," concluded Robbins understood the proceedings and could cooperate with counsel (RT 378). See *Dusky v. United States,* 362 U.S. 402 (1959).

This Court has observed that "one might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." *Massey v. Moore,* 348 U.S. 105, 108 (1954). Accord, *Westbrook v. Arizona,* 384 U.S. 150 (1966). Applicable to petitioner are remarks made about the accused in *Government of the Virgin Islands v. Niles,* 295 F.Supp. 266 (D.V.I. 1969):

> "The fact that he may be suffering from paranoia does not in this case mean that the defendant is unable to cooperate with counsel. . . As for defendant's competency to waive counsel, the court is of the opinion that one who may be suffering from paranoid delusions should not be entrusted with the sole conduct of his defense."

The reports and testimony of two alienists, petitioner's testimony and demeanor, and the expressed doubts of retained counsel affirmatively show that petitioner could not competently waive counsel in order to represent himself.

II.

HIGHWAY PATROL OFFICERS PROPERLY DETAINED PETITIONER AFTER HE DROVE INTO THE ONCOMING LANE

Petitioner complains that California has improperly extended the Court's holding in *Terry v. Ohio,* 392 U.S. 1 (1968), to authorize detention of a motorist upon a rational suspicion that he has violated traffic laws. "No such police authority, to make highway stops in the middle of the night to investigate erratic driving . . . is needed for the enforcement of the vehicle laws," petitioner insists. Petition, 10. "Absent probable cause, exigent circumstances or some paramount government interest, [citations], police intrusions on the right of the motorist to be let alone are vexatious and offensive to our notions of individual freedom." Petition, 10-11. To permit detention upon a mere rational suspicion that the motorist has violated traffic laws encourages police "to escalate the investigation into other more substantial criminal areas." Petition, 11.

On the contrary, California has carefully limited the power of the police in the context of a traffic violation.

> "An investigation relating to the detention required to issue a warning or citation for a minor traffic or vehicle equipment violation is limited in scope. The officer may require the driver to identify himself, produce his driver's license and the registration certificate for the vehicle, and he may interrogate with respect to the violation or violations which he has observed. Absent some suspicious circumstances, he may not search the driver or the vehicle [citations], and he may not conduct an exploratory interrogation designed to elicit incriminating information wholly unrelated to the matter at hand. [citations]." *People v. Grace,* 32 Cal.App.3d 447, 452-53, 108 Cal. Rptr. 66, 69 (1973). Accord, *Willett v. Superior Court,* 2 Cal.App.3d 555, 83 Cal.Rptr. 22 (1969). *And contrast People v. Brisendine,* 13 Cal.3d 528, 531 P.2d 1099 (1975), and *People v. Norman,* 14 Cal.3d 929, 538 P.2d 237 (1975), *with United States v. Robinson,* 414 U.S. 218 (1973), and *Gustafson v. Florida,* 414 U.S. 260 (1973).

Petitioner's detention was proper under any standard. Officer DePue twice observed Robbins steer his automobile into the oncoming traffic lane. Except in specified situations not pertinent here, California Vehicle Code section 21650 requires that "Upon all highways a vehicle shall be driven upon the right half of the roadway. . . ." Nelson Road is a "highway" within the meaning of this statute. Calif. Veh. Code § 360. Beyond giving rise to a rational suspicion or a

reasonable belief that a violation had occurred, petitioner's conduct constituted an offense committed in the officers' presence. Accordingly, petitioner was subject to citation for an infraction: violation of Vehicle Code section 21650. Calif. Veh. Code § 40000.1. The power to cite necessarily implies the power to detain and identify. Moreover, an automobile driving into an oncoming lane on a foggy night is an exigent circumstance which the State has a paramount interest in preventing.

III

THE OFFICERS WERE NOT OBLIGED TO ADVISE OF HIS RIGHTS AN ARRESTEE WHOM THEY NEVER INTERROGATED.

Petitioner contends that whether or not police interrogate a suspect, at the moment of arrest they are obliged to advise him of his constitutional rights in accordance with *Miranda v. Arizona,* 384 U.S. 436 (1966). Absent an admonition, petitioner reasons, volunteered statements must be excluded to accomplish the purpose of *Miranda.* Petition, 11-14.

As the Court recently reiterated:

> "Our decision in *Miranda* set forth rules of police procedure applicable to 'custodial interrogation.' 'By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Oregon v. Mathiason,* 45 U.S. Law Week 3505 (1977).

The purpose of *Miranda* was to insulate the Fifth Amendment privilege against self-incrimination from the coercion inherent in police interrogation. 384 U.S. at 467. It is official questioning which creates the need and the duty to warn. "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 U.S. at 478. *Miranda's* purpose would not be subserved by the expansion of its rule suggested by petitioner.

Although petitioner urged essentially this point in the trial court (RTS 23-37), his failure to present the claim to the state appellate courts forecloses him in this Court. See *Tacon v. Arizona,* 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969).

IV

DENIAL OF PETITIONER'S REQUEST TO REOPEN HIS SUPPRESSION MOTION DID NOT DENY HIM DUE PROCESS

California Penal Code section 1538.5 provides the exclusive preconviction remedy for suppressing evidence on grounds of illegal search or seizure.[3] Pursuant to the statute petitioner's suppression motion was heard and denied on March 24, 1975. On the opening day of trial and again during trial, petitioner sought to reopen his motion (RT 7, 200, 207). The trial court denied both requests as untimely, and characterized petitioner's offer of proof as inadequate (RT 8-9,

[3]Petitioner did move, unsuccessfully, to suppress evidence at his preliminary examination (RT 201-202).

208). Robbins argues that the court's failure to reopen the suppression hearing to consider newly discovered evidence deprived him of a full and fair hearing on his Fourth Amendment claims, thereby denying due process of law. Petition, 14-18.

The statute makes no provision for renewing a suppression motion at trial. The purpose of this omission is to compel litigation of search and seizure claims before trial, thus avoiding the necessity for mistrials, conserving judicial and jury time, and affording the prosecution an opportunity to obtain appellate review of adverse rulings. *People v. Superior Court,* 4 Cal.3d 605, 483 P.2d 1202 (1971). Plainly, this procedural rule vindicates a "substantial state interest." *Henry v. Mississippi,* 379 U.S. 443, 448-449 (1965).

However, Penal Code section 1538.5(h) provides that if "the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial. . . ." Petitioner contends that by erroneously rejecting his claim of newly discovered evidence entitling him to another suppression hearing at trial, the court so misapplied state law as to violate the Federal Constitution.

The trial court ruled correctly because petitioner's evidence was not newly discovered but newly disclosed and because it was immaterial. At the suppression hearing and at trial Officer DePue stated he observed petitioner moving 30 miles per hour in a 55 miles per hour zone (RT 5, 6, RT 37, 65). At trial,

petitioner presented conflicting evidence to the effect that while part of Nelson Road was posted at 55, while observed by DePue he was on a curve posted at 30 or 35 (RT 239-240). Robbins' trial testimony discloses that he was well aware of this stituation at the time of his suppression hearing. While driving 30 to 35 miles per hour he testified, "I was operating in accordance with the suggested maximum safe speed, which I found to be high." (RT 249). Moreover, misapprehension of the speed limit by DePue could not have affected the legality of a traffic stop for driving into an oncoming lane.

Petitioner next claims that only after his suppression hearing did he learn that the vial of liquid found in his person, smelled and confiscated by the arresting officers, contained amyl-nitrate, a compound which allegedly could have affected the patrolmen's senses if inhaled in sufficient quantity. Petition, 17.

In fact, petitioner was permitted to elicit from DePue and Stoltz testimony that each took but a single whiff of the liquid and noticed no physical effects (RT 19, 23). A defense toxicologist generalized about the chemical's effects (RT 423, 458-466, 471-475), but was unable to predict the effect of one whiff upon a given individual (RT 466). Thus, petitioner's evidence was no more probative than his offer of proof.

More important, his claim was irrelevant to Fourth Amendment issues. Neither officer was exposed to the amyl-nitrate until after both observed Robbins' erratic driving, stopped him, noted the familiar odor of

burned marijuana and pat-searched him (RTS 21-22, 23-25). The accuracy of the highway patrolmen's observations to that point is confirmed by petitioner's admissions that "it is entirely possible that I did cross the road markings," (RT 250, 297) and that a passenger had been smoking marijuana in his station wagon one hour earlier (RT 297). Each of the officers' subsequent observations occurred after probable cause for arrest existed and was embodied in physical evidence introduced at trial.

Petitioner asserts that he used the vial of amyl-nitrate to improve his auto engine performance. Petition, 15; RT 328-329. But the trial judge could have discredited his professed pretrial ignorance of the chemical's effect on human perception by reason of petitioner's trial testimony that "I understand it can be used to heighten sexual orgasm." (RT 481).

The trial court did not deny due process by refusing to consider evidence (1) apparently known to petitioner at the time of his suppression hearing and (2) immaterial to the resolution of his search and seizure claims.

V

THE STATE MAY CONSTITUTIONALLY PROHIBIT THE POSSESSION, TRANSPORTATION, AND SALE OF MARIJUANA

State and federal statutes outlawing marijuana are unconstitutional, petitioner contends, because "laws regulating its use, transportation and sale have no rational relationship to a justifiable state end." Peti-

tion, 20. While Robbins thus appears to invoke Fourteenth Amendment due process, his citation of *Ravin v. State,* 537 P.2d 494 (Alaska, 1975), and *Stanley v. Georgia,* 394 U.S. 557 (1969), suggests additional reliance upon the notion that regulation of marijuana violates a right of privacy not yet discovered in the Federal Constitution.[4]

Preliminarily, we note that petitioner asks the Court to resolve "medical, psychological and moral issues of considerable controversy in America," *United States v. Kiffer,* 477 F.2d 349, 352 (2d. Cir.), *cert. denied,* 414 U.S. 831 (1973), upon a barren record. Unlike *Ravin,* in which expert testimony was produced in the trial court, 537 P.2d at 504, petitioner did not properly present this claim or any evidence to the state courts. See *Tacon v. Arizona, supra; Cardinale v. Louisiana, supra.*

The argument that there no longer remains any rational basis for prohibiting the use of marijuana has been rejected by federal and state courts. "[A] holding that a legislative enactment is invalid cannot rest upon a judicial determination of a debatable medical issue." *United States v. Thorne,* 325 A.2d 764 (D.C.

[4]Although petitioner does not invoke the Eighth Amendment, his plaintive cry that he has been "sentenced to five years to life in San Quentin prison for this possession and transportation of the vegetable, marijuana," Petition, 18, evokes response. First, petitioner was previously convicted in federal court for sale of heroin. (CT 66). Second, petitioner's term is presently a matter of speculation, the statutes under which he was convicted having been amended to provide for a four year maximum term. 1976 Stats. Ch. 1139, §§ 71, 73, and 74. The repealing law, unless modified by the Legislature, will become operative July 1, 1977 with general retroactive effect. See *People v. Reece,* 66 Cal.App. 3d 96, 135 Cal.Rptr. 754 (1977).

App. 1974). "This is a legislative function and we leave it to the Legislature to determine whether in its wisdom a change in or repeal of existing laws is warranted." *People v. Aguiar,* 257 Cal.App.2d 597, 603, 65 Cal.Rptr. 171, 175 (1968).

Petitioner's reliance upon *Ravin* and *Stanley* is greatly misplaced. Robbins was convicted for possession, possession for sale, and transportation of over 30 pounds of marijuana on a California highway. His was a commercial enterprise, not a private home use. The zone of privacy protected by *Stanley* does not extend beyond the home. Contrary to the reasoning of the concurring and dissenting opinion of Justice T. G. Kavanaugh in *People v. Lorentzen,* 194 N.W.2d 827, 834 (Mich. 1972), Petition, 22-23, the right to possess and use something within the home does not create a corresponding right to transport or distribute it. *United States v. Orito,* 413 U.S. 139, 141-143 (1973) (obscene material). The inapplicability of *Stanley,* of *Griswold v. Connecticut,* 381 U.S. 479 (1965), and of *Roe v. Wade,* 410 U.S. 113 (1973), Petition 21, to commercial marijuana activities has been noted in *United States v. Horsley,* 519 F.2d 1264, 1265 (5th Cir. 1975), *cert. denied,* 424 U.S. 944 (1976), and in *United States v. Kiffer,* 477 F.2d at 352.

Nor does *Stanley* create a right of privacy encompassing use of marijuana in the home.

> "What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items such as narcotics . . . a crime." *Stanley v. Georgia,* 394 U.S. at 568, n. 11.

Possession of marijuana in the home "can under no factual or legal interpretation be classified as fundamental or implicit in the concept of ordered liberty." *Louisiana Affiliate of Nat'l Org. for Reform of Marijuana Laws v. Guste,* 380 F.Supp. 404, 407 (E.D.La. 1974), *aff'd* 511 F.2d 1400 (5th Cir.), *cert. denied,* 423 U.S. 867 (1975).

Ravin, far from being persuasive, illustrates, the weakness of petitioner's federal claim. Construing an express state constitutional guarantee of the right to privacy in a manner "consonant with the character of life in Alaska," 537 P.2d at 504, the Alaska court acknowledged that no such analogous federal right has been recognized, 537 P.2d at 502, and abandoned the well-established "rational basis" test in favor of a "close and substantial relationship" standard of its own design. Judicial repudiation of legislative judgments by application of increasingly sensitive standards of constitutional review is less appropriate in the federal context than within the state.

CONCLUSION

The state of the record warrants denial of the petition for a writ of certiorari. The state of the law regarding the retroactive or prospective application of *Faretta v. California, i.e.,* the existing conflict between states and the potential federal-state conflict within the Ninth Circuit, warrants granting certiorari limited to that question and affirmance by the

Court without further briefing or oral argument. *Cf. DeStefano v. Woods,* 392 U.S. 631 (1968); *Roberts v. Russell,* 392 U.S. 293 (1968).

Dated, March 4, 1977.

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